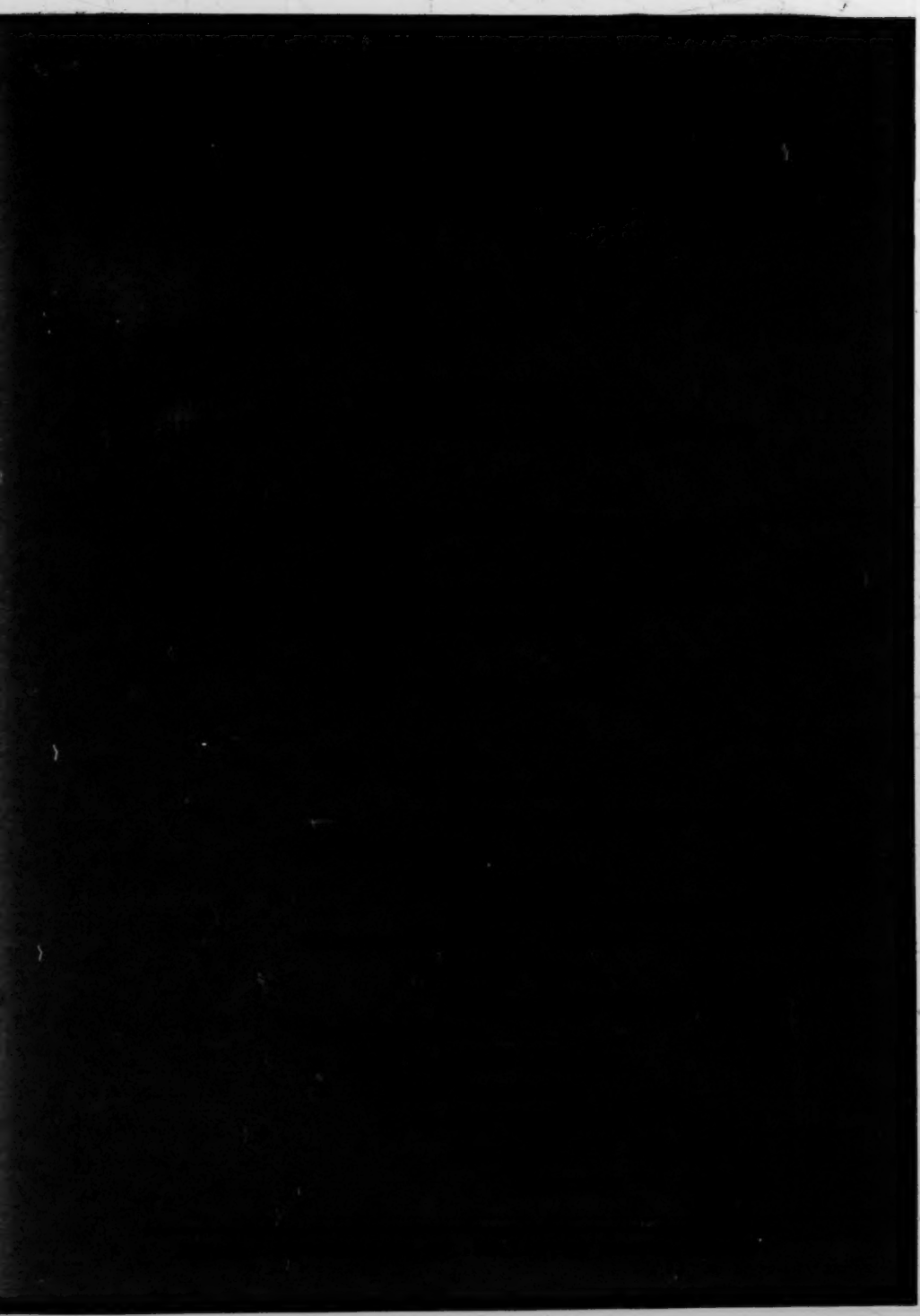

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Supreme Court of the United States.

October Term, 1973.

No. 72-1254.

JOSEPH SMITH,
SHERIFF OF WORCESTER COUNTY, Appellant,
v.
VALERIE GOGUEN, Appellee.

ON APPEAL FROM A JUGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR APPELLEE.

Questions Presented.

1. Whether Massachusetts General Laws, c. 264, § 5, is, on its face and as applied to appellee, unconstitutionally vague in violation of the Fourteenth Amendment?
2. Whether Massachusetts General Laws, c. 264, § 5, is, on its face and as applied to appellee, unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

Statement of the Case.

Appellee adopts in full appellant's statement set forth in the Brief for Appellant, pages 5-6.

Summary of Argument.

I.

A. Appellant is barred from claiming that appellee failed to exhaust his available state remedies (28 U.S.C. 2254(b)) since appellant admitted exhaustion in his return (App. 44) and failed to raise the claim in both lower federal courts.

B. The facial vagueness of Massachusetts General Laws, c. 264, § 5 (hereafter the statute), was considered and decided by the state court when it held that the statute was not vague as applied to appellee.

C. Appellee may properly challenge the statute as facially vague in violation of the Fourteenth Amendment. The nature of his conduct is not reasonably distinguishable from other behavior sought to be proscribed. The statute is incapable of clarification so as to provide fair notice to other potential offenders as to what is proscribed. An interpretation distinguishing appellee's behavior from that of others is unwarranted in light of the statute's language and purpose.

D. The statute is vague on its face and as applied to appellee since it gives no fair warning as to what conduct is proscribed, leaving the police and the courts with unbridled discretion to enforce it. This defect cannot be remedied by a narrowing construction of the statute.

II.

Massachusetts cannot constitutionally utilize criminal sanctions to enforce respect for the flag of the United States. The First Amendment disables Massachusetts from compelling any person to render ritualistic obeisance to an emblem of the State, whether by being ordered to salute it or by being ordered to observe a series of taboos concerning its use or display.

III.

A. The First Circuit was correct in holding the statute unconstitutionally overbroad in violation of the First Amendment. Since the statute reaches "pure speech" and is incapable of remedial excision, it is unconstitutional on its face. Moreover, it causes a substantial restriction on symbolic expression and fails to meet the quadripartite test of *United States* v. *O'Brien*, 391 U.S. 367 (1968).

B. The statute as applied to appellee is unconstitutionally overbroad since appellee's conduct is a form of expression entitled to First Amendment protection and no state interest in support of the statute justifies its application to him.

Argument.

I. The First Circuit Court Properly Found Massachusetts General Laws, c. 264, § 5, Unconstitutionally Vague on its Face.

A. *Appellant May Not Raise the Issue of Exhaustion of State Remedies for the First Time in this Court.*

Appellant argues for the first time in this Court that appellee did not argue to the Supreme Judicial Court of Massachusetts that Massachusetts General Laws, c. 264, § 5, was unconstitutionally vague on its face. Therefore, appellant now claims that appellee failed to exhaust his state remedies in violation of 28 U.S.C. 2254(b). (Brief for Appellant, 7-13.)

In the District Court, appellee attacked the statute as being in violation of the First Amendment guarantee of freedom of speech and the Fourteenth Amendment guarantee of due process of law because it is overly broad and impermissibly vague both on its face and as applied to

appellee (App. 43). Appellant admitted in his return that appellee had properly exhausted his state remedies (App. 44), and the District Court found that appellant had made no claim that the issues raised by appellee were not appropriately raised in the state proceedings.[1]

Then, having admitted that appellee did exhaust his state remedies in the District Court, appellant did not present such a claim to the First Circuit. Instead, appellant only argued that the First Circuit should not consider both facial vagueness and overbreadth because appellee should not be permitted to avail himself of potential constitutional claims of others. *Goguen* v. *Smith*, 471 F. 2d 88, 90-91 (1st Cir. 1972).

Thus, appellant's argument that appellee did not exhaust his state remedies as to the facial vagueness claim is barred by appellant's admission in his return and the rule that a party cannot raise on appeal for the first time in this Court an issue never raised or considered below. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334 (1959); *Jesionowski* v. *Boston & Maine Railroad*, 329 U.S. 452 (1947); *United States* v. *New York Telephone Co.*, 326 U.S. 638 (1946).

B. *The Facial Vagueness of the Statute was Decided by the State Court when it Held that the Statute was Not Vague as Applied to Appellee.*

Assuming *arguendo* that the exhaustion issue is properly before this court and has not been waived, appellant is incorrect in concluding that the Supreme Judicial Court of

[1] "No contention is now made that the petitioner has not exhausted state remedies, nor that the constitutional issues presented here were not raised appropriately in state proceedings." *Goguen* v. *Smith*, 343 F. Supp. 161, 164 (D. Mass. 1972).

Massachusetts did not consider the issue of facial vagueness.[2]

Although it is difficult to determine from the confusing opinion of the Supreme Judicial Court which issues were actually analyzed, it was apparent to the state court from the amended bill of exceptions that appellee raised the issue of facial vagueness under the Fourteenth Amendment (App. 1). Moreover, appellant was certainly aware that the issue was before the state court because it was argued in the Commonwealth's brief before that court.[3] Unlike the cases cited by appellant at page 10 of his brief, the state court did not state that it treated the facial vagueness question as waived, nor did it invoke its Rule 1:13.

Although the Supreme Judicial Court of Massachusetts dismissed the issue of vagueness in one sentence,[4] the citations for that summary conclusion indicate that the facial vagueness issue was fairly considered. In each case cited directly the statute involved was analyzed for both overbreadth and facial vagueness but found to withstand those attacks (see *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 746-749 (S.D. Ill. 1971) and *Oldroyd* v. *Kugler*, 327 F. Supp. 176, 178 (D. N.J. 1970)).

Moreover, the issue of vagueness "as applied" in the instant case is inextricably tied to the issue of whether the statute is vague on its face. *Goguen* v. *Smith*, 471 F. 2d 88,

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[2] As is demonstrated in part C below the facial vagueness issue in the non-First Amendment context is the total lack of clarity and precision in the term "contemptuously."

[3] "There was no error in denying this motion [to dismiss]. The issue raised in this motion was that G.L. c. 264, § 5, was unconstitutional because it violated the defendant's right to freedom of speech and the statute is overly broad and vague and incapable of fair and reasonable interpretation . . ." (App. 31.)

[4] "Whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here." (App. 37.)

94. Therefore, in deciding that the statute was not vague as applied to appellee, the state court necessarily decided that it was not vague on its face.

C. *The First Circuit Properly Considered the Appellee's Facial Vagueness Claim on its Merits.*

As appears at part B above, appellee urges that the questions of facial vagueness and vagueness as applied are necessarily merged and may be decided together. Nonetheless, assuming that in a non-First Amendment context the statute is not vague as applied to appellee, he may still avail himself of potential vagueness claims of others to defeat the statute.

The well-known abstinence prescription of *United States* v. *Raines*, 362 U.S. 17, 21,[5] is not controlling here. Rather, the exceptions to the prescription and a close reading of *Raines* itself, compel a rejection of the rule.

> "[W]here a statute has already been declared unconstitutional in a large number of its intended applications, and it appears that it was not intended to stand as valid in the few remaining fortuitous situations to which it might apply, Butts v. Merchants' & Miners' Transportation Co., 230 U.S. 126 (1913); or where a state court has declared valid one provision or application of a statute which is inextricably tied up with an invalid one, Dorchy v. Kansas, 264 U.S. 286, 290 (1924)—in such circumstances the broad constitutional challenge may be mounted. We read these exceptions as not depending upon the historic fortuity that

[5] "[One] to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

a statute has already been subjected to such holdings but as depending upon the probability of such holdings invited by the wording of the statute. From the failure of *Raines* to cite the vagueness cases to which we have referred and in the light of the thrust of the foregoing two exceptions, we think the sense of the doctrine is that if the nature of a party's conduct is not so dissimilar from other behavior sought to be proscribed by a statute, such that an interpretation distinguishing his behavior from that of others would not provide more certain notice to potential offenders and would also seem unwarranted in the light of a legislative determination to cover all such activities, then a void-for-vagueness challenge allows a court to rule on the facial constitutionality of that statute." *Goguen* v. *Smith*, 471 F. 2d 88, 92.

The First Circuit's holding that appellee could mount a facial vagueness attack based upon potential vagueness as to others is especially persuasive in view of this Court's decision in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), where one who was guilty of vagrancy by virtue of his disorderly conduct—resisting arrest—successfully pressed potential vagueness claims of others; *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), where one whose conduct was clearly not vague under an antinoise ordinance was permitted to mount a facial vagueness claim on the merits; and *Colten* v. *Kentucky*, 407 U.S. 104 (1972), where this Court once again considered a facial vagueness claim on the merits after concluding that the statute was not vague as applied.

Appellant attempts to distinguish the foregoing on the ground that the laws involved there were broad in subject matter and the statute here is "much narrower," being

limited only to the "physical integrity" of an actual flag of the United States (Brief for Appellant, 15-18).[8] However, this argument misconstrues the vagueness claim which, accurately delineated, focuses on the phrase "treats contemptuously." "Contemptuously" is certainly as vague, if not more so, as "disorderly," "vagrancy" or "noisy." This case therefore is not distinguishable from *Papachristou*, *Grayned*, and *Colten*, and the First Circuit was correct in determining appellee's facial vagueness claim on its merits.

D. *Massachusetts General Laws, c. 264, § 5, is Vague on its Face and as Applied to Appellee.*

The essence of a claim that a statute is vague is that it is a violation of the Fourteenth Amendment's guarantee of due process of law to impose criminal penalties under a statute which does not give adequate notice of the proscribed conduct. *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963).

Statutes making use of proscriptive words which are otherwise vague may be made adequately definitive by judicial interpretation, *Roth* v. *United States*, 354 U.S. 476 (1957); by being part of a larger regulatory scheme,

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[8] Nothing in the decision of the state court shows that the statute is limited to acts of physical desecration. Appellant urged such an interpretation upon the First Circuit which quite properly rejected it as being without legal support. *Goguen* v. *Smith*, 471 F. 2d 88 (1st Cir. 1972). Moreover, since appellee was convicted for *wearing* the flag, his conduct cannot be said to in any way affect the flag's physical integrity. Thus, the state court must be said to have considered the statute as applying to all acts of contemptuous treatment whether of a physical nature or not. In contrast, the New Hampshire Supreme Court interpreted its flag desecration law to apply only to acts of a physical nature (*e.g.*, burning, tearing, etc.). *State* v. *Royal*, N.H. , 305 A. 2d 676, 679 (1973).

United States v. *Spector*, 343 U.S. 169 (1952); by employing words with a special technical meaning, *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926), or may be under the business regulations exception, *i.e.*, *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (1952). However, none of those exceptions are present here. *Goguen* v. *Smith*, 471 F. 2d 88.

The vice of vagueness inherent in this statute is the paradigm of lack of fair warning. This is amply demonstrated by appellant's concession at oral argument before the First Circuit that a veteran who used the flag as a head covering in a rainstorm might not be prosecuted. *Id.*, at 102. Thus, the government would permit certain persons to use the flag as an umbrella, but prohibit others from displaying it on clothing. The statute here is nothing more than a net set "large enough to catch all possible offenders," leaving it to the unfettered discretion of the police and the courts to determine which unwary victim is to feel the weight of criminal sanctions. *Papachristou, supra*, at 165.

The First Circuit considered the possibilities of conduct which equally could or could not be deemed contemptuous treatment and observed that not only are such possibilities manifold, but culpability might turn upon such irrational factors as the geographic location of their occurrence.

> "The possibilities of deviation which pose problems of legal forecasting are numerous: waving a flag during a speech critical of foreign or domestic policy; holding a flag while making a face or a contemptuous gesture; climaxing a speech by crumpling a flag; spitting in the direction of a flag—at a safe distance, and at an unsafe distance; wrapping a flag around oneself; displaying the flag against a background, surrounded with derogatory and condemnatory symbols and slogans; the sewing of a flag to a larger patriotic banner, to the jacket

of a bemedalled veteran, to a sleeve of a Boy Scout leader, or even to the back of a motorcyclist's windbreaker. Yet any or none of these actions could be interpreted as 'treats contemptuously.' Since persons in Leominister's business district may have views of what constitutes contemptuous treatment of the flag differing from those of persons in Cambridge's Harvard Square, it is important that the statute give all persons definite notice of what acts are prohibited." *Goguen* v. *Smith*, 471 F. 2d, at 95.

In view of the *Bunch* and *Sinniger* cases (see Brief of Appellant, at 26) where persons were convicted for using the flag as a picnic blanket and as a car seatcover, such examples are not idle speculation.

Appellant makes much of the element of intent as a factor in saving the statute. But if, as in this case, intent is inferred from conduct alone,[7] then the possibilities for application remain limitless and law enforcement officials have equally limitless discretion to choose who shall be prosecuted. The actor still has no standards by which to determine in advance whether a contemptuous intent may be inferred from his conduct.[8]

It may be argued that the statute is designed to protect the "physical integrity" of the flag (Brief for Appellant,

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[7] "The jury could infer that the violation was intentional without reviewing any words of the defendant." *Commonwealth* v. *Goguen*, App. 38.

[8] Appellant's citations to *Boyce Motor Lines, Inc.* v. *United States* and *Screws* v. *United States* are distinguishable (Brief for Appellant, 18-19). *Boyce* dealt with economic regulation and thus falls within a long-established exception to *Wright* v. *Georgia*, *supra*. In *Screws*, the statutory proscriptions were held to be well-defined. Indeed, the Court asserted that the element of intent "cannot make definite that which is undefined." *Screws* v. *United States*, 325 U.S. 91, 105 (1945).

17, 18, 29) and that this distinguishes appellee's conduct from other acts placing the flag in odd or subordinate positions or otherwise acting contemptuously towards the flag without physically harming it. See, *e.g.*, *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970), reversed on other grounds, *sub nom.*, *Hodsdon* v. *Stabler*, 444 F. 2d 533 (3d Cir. 1971). Such a contention is summarily disposed of by pointing out that no reasonable reading of the statute can lead to that conclusion. Indeed, the state court has never so narrowed the statute. Since neither this Court nor the lower federal courts have jurisdiction to authoritatively construe state legislation, the words of the statute must be given their ordinary meaning. *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369-370 (1971); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Grayned*, *supra*, at 110.

If this Court were to view the statute as limited to acts against the physical integrity of the flag, then it has been unconstitutionally applied to appellee whose display of the flag was not an act which affects its "physical integrity." Certainly no one would argue that police officers who display flags sewn on their sleeves should be punished under the statute.[9]

> "The present case cannot be compared to the situation where a person who sees thousands of others illegally crossing a street seeks to escape punishment for commission of a similar wrong. In that situation there are well-defined crossing signals, cross-walks and signs which give all persons adequate notice that they are about to commit an offense. Instead we have the totally different situation where those charged with

[9] If it be assumed without evidentiary support that appellee was convicted for sewing the flag to the seat of his pants, the act of sewing cannot be fairly said to affect physical integrity. See *Hoffman* v. *United States*, 445 F. 2d 226 (D.C. Cir. 1971) (concurring opinion of MacKinnon, J.).

violation of the statute before us, after having seen unpunished hundreds, perhaps thousands, of citizens with American flags sewn on various parts of their clothes, or flying in frayed condition from radio antennas of automobiles, or used as advertising in store windows, are expected to know that their similar actions—such as sewing a flag to the seat of one's pants—could constitute contemptuous treatment." *Goguen* v. *Smith*, 471 F. 2d 88, 96.

If, in order to save the statute from vagueness, appellee's crime was not what he did, but the attitude with which he did it, then it is necessarily overbroad in violation of the First Amendment (see Part II below). Alternatively, if the statute speaks to conduct regardless of attitude, then it is necessarily void for vagueness, since there is no way to adequately determine the conduct proscribed.

II. Massachusetts Cannot Utilize Criminal Sanctions to Enforce Respect for the Flag of the United States.

This case is yet another in a series of judicial explorations into the constitutional implications of a 20th Century phenomenon [10] called flag desecration. *E.g., West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Street* v. *New York*, 394 U.S. 576 (1969); *Radich* v. *New York*, 401 U.S. 531 (1971); *Halter* v. *Nebraska*, 205 U.S. 34 (1907); *Long Island Vietnam Moratorium Com-*

[10] Prior to 1896, no state enacted legislation compelling respect or veneration for the American flag. Indeed prior to 1892, no formal Pledge of Allegiance existed in connection with the flag. However, fanned by the patriotic fervor which swept the nation during the Spanish-American War, between 1898-1900, state after state enacted flag legislation requiring school children to pledge allegiance to the flag and imposing criminal sanctions upon individuals who failed to regard the flag with appropriate respect.

mittee v. *Cahn*, 437 F. 2d 344 (2d Cir. 1970), cert. denied 400 U.S. 956 (1970); *Illinois* v. *Sutherland*, 9 Ill. App. 2d 824, 292 N.E. 2d 746 (1973), appeal docketed August 29, 1973; *Spence* v. *Washington*, 81 Wn. 2d 788, 506 P. 2d 293 (1973), appeal docketed June 11, 1973; *Thoms* v. *Heffernan*, 473 F. 2d 478 (2d Cir. 1973), petition for certiorari filed April 9, 1973; See also, *e.g.*, *Parker* v. *Morgan*, 322 F. Supp. 585 W.D N.C. 1971); *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970); *Delaware* v. *Hodsdon*, 289 A. 2d 635 (S. Ct. Del. 1972). See generally, Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (University of Chicago Press, 1962); Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 Ariz. L. Rev. 72 (1970); Note, *Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 Mich. L. Rev. 1040 (1968). In each case, the underlying dilemma has been the extent to which a society dedicated to the principle of political toleration may utilize criminal sanctions to compel respect for or veneration of its national symbol. Appellee believes that the First Amendment disables the State from compelling any person to render ritualistic obeisance to an emblem of the State, whether by being ordered to salute it or by being ordered to observe a series of taboos concerning its use or display.

The effect of either form of compulsion is to raise a state trapping to the secular equivalent of a religious icon in violation of the First Amendment.

Our society has, with the unfortunate exception of flag legislation, successfully resisted the pressures to establish a secular religion based upon the deification of the State and its trappings.[11] See generally, Toynbee, *An Historian's*

[11] In enacting statutes imposing criminal sanctions for failure to afford respect to the flag, Massachusetts follows the German experience with its heritage of almost mystical respect for the State. The Kaiser's flag desecration statute provided:

Approach to Religion, 211-219 (Oxford, 1956). Unlike many societies less dedicated to the principle of political tolera-

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"Anyone who maliciously removes, destroys, injures or commits insulting mischief on a public emblem of the authority of the Empire, or of a federal sovereign, or an emblem of the majesty of a federal state, shall be punished by a fine up to 600 Shillings, or by imprisonment with labour up to two years." G. Drage, *Criminal Code of the German Empire*, § 135 (Novella of 1876), at 223 (1885).

In 1932, the German flag desecration statute was amended to provide:

"Whoever publicly profanes the Reich or one of the states incorporated into it, its constitution, colors or flag or the German armed forces, or maliciously and with premeditation exposes them to contempt, shall be punished by imprisonment." (December 19, 1932, RGB 1-I, 548) reproduced in United States War Dept. Pamphlet No. 31-122, *Statutory Criminal Law of Germany*, § 134a, at 95 (August, 1946).

In 1935, Hitler broadened the German statute in the following language:

"Whoever publicly profanes the German National Socialist Labor Party, its subdivisions, symbols, standards and banners, its insignia or decorations or maliciously and with premeditation exposes them to contempt shall be punished by imprisonment." (June 28, 1935) reproduced in United States War Department Pamphlet No. 31-122, *supra*, at 96.

Finally, in 1951, the Federal Republic of Germany enacted the following statute:

"Anybody who publicly . . . (1) defames or maliciously vilifies the Federal Republic of Germany, one of her states, or the constitutional order; or (2) urges or casts disparagement upon their colors, flags, coats-of-arms, or national anthems shall be punished by imprisonment." G. Mueller and T. Buergenthal, *German Penal Code of 1871*, § 86, *Defamation of the State*, at 60 (1961).

Significantly, Great Britain, whose tradition of political toleration parallels our own, has never enacted legislation prohibiting flag desecration.

tion, we have refused to bow to the "cult of personality" or to the spectre of "statism."

It was once the law that a state's asserted interest in enforcing respect for the flag justified compulsory flag veneration. *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940). However, the notion that the symbolic nature of the flag could form the pretext for the suspension of constitutional freedoms was explicitly rejected three years later in *West Virginia State Board of Education* v. *Barnette, supra,* when this Court overruled *Gobitis* and ruled that compulsory flag salutes violated the First Amendment. Mr. Justice Jackson, writing for this Court in *Barnette,* explicitly rejected the argument that the symbolic nature of the flag conferred upon it a talismanic immunity from the reach of the First Amendment. In words particularly apposite to this appeal, Mr. Justice Jackson wrote:

> "There is no mysticism in the American concept of the State or of the nature or origin of its authority. . . . The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." 319 U.S., at 641.

In *Street* v. *New York, supra,* Mr. Justice Harlan ruled that New York could not punish an individual for contemptuous language directed at an American flag. Drawing heavily upon *Barnette,* Mr. Justice Harlan dismissed the state's interest in insuring proper respect for the mystical integrity of the flag as unworthy of a free society. *Street* v. *New York, supra,* at 593.[12]

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[12] In *Street, supra,* Mr. Justice Harlan enumerated four possible interests served by a flag desecration statute (1) a prohibition upon incitement to unlawful activity; (2) an interest in preventing

Whether one is compelled to respect a flag by saluting it or by observing a series of taboos concerning its use or display, the overriding state interest underlying both forms of compulsion is identical—the maintenance of respect for a symbol of the state. Such an interest has been measured by Mr. Justice Harlan in *Street* and by Mr. Justice Jackson in *Barnette* and has been found wanting. It has no place in a society dedicated to political and religious toleration.

Two hundred years ago, the dominant form of state imposed orthodoxy involved matters of religious belief and practice. Today, heresy is far more likely to be political than religious in nature. Cf. Solzhenitsyn, *One Day in the Life of Ivan Denisovich* (E. P. Dutton, 1963). However, just as the Establishment clause of the First Amendment was designed to act as a barrier against attempts to establish an "official" body of religious dogma, so the Free Speech clause stands as a barrier against well intentioned attempts to establish an official body of patriotic dogma, with our flag as its central totem.

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breaches of the peace caused by hostile reactions to a "contemptuous" use of the flag; (3) an interest in protecting the sensibilities of passers-by who might be offended by "contemptuous" flag usage; and (4) an interest in assuring that citizens maintain proper respect for the flag. *Id.*, at 590-591. As in *Street*, no evidence exists that appellee "incited" any person to unlawful activity, Moreover, no evidence whatever exists that appellee's contemptuous flag usage threatened an imminent breach of the peace. Indeed, the record indicates that appellee's contemptuous flag usage was greeted only by laughter. Finally, Justice Harlan in *Street* properly gave short shrift to the protection of the sensibilities of passers-by when he stated:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.*, at 592.

Massachusetts may no more punish appellee for failing to afford proper respect to the flag than could West Virginia in *Barnette* and New York in *Street*.

The free speech clause of the First Amendment bars attempts to "establish" secular as well as religious orthodoxy.[13] Our flag—as the emblem of a society of free men and women—proclaims the ability of free people to treat it as their conscienes dictate. Those who would punish "contemptuous" treatment paradoxically endanger the very freedom which the flag is designed to represent.

III. Massachusetts General Laws, c. 264, § 5, is Unconstitutionally Overbroad in Violation of the First Amendment.

A. *The Statute is Unconstitutionally Overbroad on its Face.*

The starting point in determining whether a statute is unconstitutionally overbroad in violation of the First Amendment's guarantee of freedom of expression is to determine whether the statute in fact reaches any recognizable expression.[14] We submit that the First Circuit was

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[13] As Mr. Justice Jackson noted in *Barnette:*

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in *politics, nationalism, religion, or other matter of opinion* or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis added.) 319 U.S., at 642.

[14] It is well established that a First Amendment facial overbreadth challenge may be made "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965); *Gooding* v. *Wilson, supra.* Where the statute is "substantially" overbroad its ". . . very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma,* U.S. , 93 S. Ct. 2908, 2916 (1973). The requirement of "substantial" overbreadth is met here

correct in finding that the United States flag is such a powerful symbol that any but purely utilitarian conduct with regard to it is communicative.

> "When more neutral, utilitarian objects such as draft cards are involved in conduct, courts have to decide when such conduct becomes symbolic speech. *O'Brien.* Symbol, semantically, stems from a Greek word meaning 'token' or 'sign,' Webster's Third International Dictionary, Unabridged at 2316. (G & C Merriam Co., Springfield, Mass., 1966.) More specifically, and important for the instant case, a symbol may constitute 'an act, sound or material object having cultural significance and the capacity to excite or objectify a response.' *Id.* Such a primary symbol, likely to be recognized by all who see it, speaks when it is placed in odd positions, conjoined with symbols or words, or made the butt of grimaces, speech, or gestures. We do not have to determine generally at what point that which is often called conduct becomes akin to pure speech. But when the object is a pure symbol, such as the flag in *Halter,* the cross, the Star of David, the crescent, the swastika, the hammer and sickle, the red flag in *Stromberg* v. *California,* 283 U.S. 359 (1931), or black armband in *Tinker,* any individualized activity with regard to it outside of the purely logistical activity of maintaining or storing of it is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech.' " *Goguen* v. *Smith,* 471 F. 2d, at 99.

Appellant appears to argue that the flag's meaning is so diverse and diffuse that it is impossible to conclude that

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since the statute cuts a broad swath through protected areas and continuous impermissible application is assured by the nature of the proscription, *i.e.,* treatment of the flag evincing a contemptuous attitude.

the flag is always "saying something" (Brief for Appellant, 23-25), although even his supportive citation concedes that the flag "[a]lways . . . represents America in all its marvelous diversity." *Parker* v. *Morgan*, 322 F. Supp. 585, 588 (W.D. N.C. 1971). The better view of the flag's meaning is that which appears in *Halter* v. *Nebraska:*

> "[T]he flag [has been] the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression." 205 U.S. 34, 43 (1907).

and in *Joyce* v. *United States:*

> "Throughout our history as a nation the flag has been our symbol in many ways, foreign and domestic. . . . It has signified our national presence on battleships, airplanes, school houses and army forts. . . . Wherever it flies it signifies the presence of the United States of America." 454 F. 2d 971, 975-976 (D.C. Cir. 1971).

Accordingly, it is indeed "self-evident that most, if not all, conduct associated with the flag is symbolic speech." *Crosson* v. *Silver*, 319 F. Supp. 1084, 1086 (D. Ariz. 1970). Accord, *Hodsdon* v. *Buckson, supra.* See also *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F. 2d 344 (2d Cir. 1970), *Hoffman* v. *United States*, 445 F. 2d 226 (D.C. Cir. 1971).

Even if the flag's symbolic meaning is too undifferentiated to be defined for First Amendment purposes, the

statute still is directed at the suppression of expression. Appellant himself urges upon this Court that appellee was convicted for his contemptuous state of mind (Brief for Appellant, 18). In oral argument before the First Circuit, appellant admitted that if two persons did exactly the same thing with respect to the flag, only the one with a contemptuous state of mind would be prosecuted. *Goguen* v. *Smith*, 471 F. 2d., at 102. The statute, therefore, violates the First Amendment by punishing, not conduct, but attitude. In *West Virginia State Board of Education* v. *Barnette, supra,* this court held that the First Amendment barred government from forcing citizens to demonstrate their fealty to whatever it considered "orthodox in politics, nationalism, religion, or other matters of opinion." *Id.*, at 642. While that case dealt with a state's attempt to force a showing of respect and this case concerns an attempt to prevent a showing of contempt, the principle of First Amendment protection remains constant. Indeed, this court has expressly held that a state may not prevent the public expression of contempt for the flag.

> "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinion about our flag, *including those opinions which are defiant or contemptuous.*" *Street* v. *New York, supra,* at 593. (Emphasis added.)

Although the statute here, unlike the statute in *Street,* does not make explicit reference to "words," the language plainly encompasses pure speech as well as symbolic expression.

"This is not a case like *Street* where a federal court could, by excising but a few words, draw precise lines with constitutional certainty so as to eliminate the interpretation or provision of the statute under which the defendant was convicted. Such per se rules of First Amendment privilege, Note, *The First Amendment Overbreadth Doctrine, supra* at 882-910, were appropriate there because the Court felt that the defendant in *Street* might have been convicted of casting contempt, 'by words,' and it could easily excise those those words from the statute, thereby reversing that defendant's conviction. The case before us is quite different in that by deleting the phrase 'treats contemptuously' from Mass. Gen. Laws ch. 264, § 5, we would completely frustrate and subvert the Commonwealth's intention as evidenced by those terms. Clearly, as the Commonwealth stated at argument, it does not wish to punish all acts of the flag, but only contemptuous ones. Yet to alter the face of this statute, leaving it to read 'Whoever publicly mutilates, tramples upon, [or] defaces . . . the flag' would be legislating for the state, because the element of contempt common to every offense under this statute would be removed." *Goguen* v. *Smith*, 471 F. 2d, at 104.

If the statute is not found unconstitutionally overbroad as a regulation of pure speech, it nevertheless must fall as an overbroad regulation of symbolic speech.

It is conceded that a state may curtain symbolic expression, but only as it is necessary to further a substantial governmental interest. In *United States* v. *O'Brien*, 391 U.S. 367 (1968), this Court used a four-part analysis to determine when government can regulate conduct containing "speech" and "non-speech" elements. The Court took

judicial notice of the symbolic speech element of burning a draft card but concluded that the government had a legitimate interest in requiring the preservation of draft cards in furtherance of its power to raise and support armies and to insure the efficient functioning of the Selective Service System.

According to *O'Brien*, in order for a government regulation of "symbolic speech" to be constitutionally justified it must (a) be within the constitutional powers of the government; (b) further an important or substantial government interest; (c) the government interest must be unrelated to the suppression of free speech; and (d) any incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of a legitimate governmental interest. *O'Brien*, p. 377.

Assuming a substantial governmental interest might be to protect against a breach of peace, that interest may be furthered only by narrowly-drawn statutes aimed at specifically inflammatory conduct. *Gooding* v. *Wilson*, *supra*. In *Street* v. *New York*, *supra*, this court concluded that protecting against a breach of the peace could not constitutionally justify conviction of Street for his use of contemptuous words directed against the United States flag.

There is no rational distinction between the use of opprobrious words toward the flag and the conduct of appellee. The fatal flaw of the statute is that it does not attempt to limit itself to those acts and words which might incite others to unlawful conduct or to a breach of the peace, but sweepingly proscribes all words or acts, however innocuous, which show contempt for our flag. An individual could be prosecuted under G.L. c. 264, § 5, for sticking his tongue out at the flag or for revealing his distaste for the flag by any passive expression of opinion. See *Tinker* v. *DesMoines*

Independent Community School District, 393 U.S. 503 (1969). The present case is therefore distinguishable from that in which the legislature has narrowly drawn a proscription against conduct within the legislative competence. See *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

It is also well settled that expression may not be prohibited merely because it offends the sensibilities of those who may observe or listen, *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Street* v. *New York, supra,* even though such expression concerns the United States flag. *Barnette, supra; Street, supra.* Compare *Halter* v. *Nebraska,* 205 U.S. 34 (1907).

Most recently this Court has held that the public use of a particularly offensive "vulgar allusion" could not be constitutionally punished. *Cohen* v. *California,* 403 U.S. 15 (1971). The Court was of the opinion that despite the objectionable and offensive nature of Cohen's expression, it was permissible speech in a public forum:

> ". . . [In] arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, *e.g., Organization for a Better Austin* v. *Keefe,* 401 U.S. 415 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e.g., Rowan* v. *Post Office Dept.,* 397 U.S. 728

(1970), we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.' *Id.*, at 738." *Cohen, supra*, at 21.

As in *Street*, the court in *Cohen* also considered and rejected an argument that the communication might incite violent retaliation.[15]

The Court reiterated that such a rationale must be based upon a probability of violence rather than an "undifferentiated fear or apprehension of disturbance."

> "The rationale of the California court is plainly untenable. At most it reflects an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.' *Tinker* v. *Des Moines Indep. Community School Dist., supra* at 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force

[15] This breach of peace theory is peculiarly liable to abuse when applied against unpopular expressions and practices. It makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence. The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow settlers at 'Fruitlands,' not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until law and order were maintained by shutting him up. A man does not become a criminal because some one else assaults him, unless his own conduct is in itself illegal or may be reasonably considered a direct provocation to violence." Chaffee, *Free Speech in the United States*, pp. 151-152 (1942).

> persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves." *Cohen, supra,* at 23.

The statute cannot therefore be justified as preservative of the public peace.[16] *Hodsdon* v. *Buckson, supra,* at 536; *Crosson* v. *Silver, supra,* at 1089.

The language and purpose of the statute seek to prevent the public expression of a "contemptuous" attitude toward the flag.[17] Thus the statute is a direct attack upon freedom of expression expressly prohibited under the third *O'Brien* test. Furthermore, the statute contains no safeguards against the impairment of freedom of expression by limiting itself to the circumstances attendant upon the expression. Instead it censures content. *Cohen, supra.*

Finally, appellant asserts that the state has an interest in preserving the physical integrity of the flag as a "symbol of unity on national ideas or purposes." (Brief for Appellant, 24).[18] See *Goguen* v. *Smith,* 343 F. Supp. 161 (D. Mass. 1972). While several courts have considered this to be a proper state interest (see *Hoffman* v. *United States, supra; Joyce* v. *United States, supra; Goguen* v. *Smith,* 343 F. Supp. 161 (D. Mass. 1972). See also *Street* v. *New York,*

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[16] As applied here, of course, rather than a threatened breach of the peace, the evidence shows that persons present were amused (App. 3).

[17] Witness the appellant's contentions in oral argument before the First Circuit, *Goguen* v. *Smith,* 471 F. 2d, at 102.

[18] We disagree. See Part II, *supra.*

supra, dissenting opinions), this Court has held that such is not a legitimate state interest as to "pure speech." *Street, supra*. There is no rational way to distinguish the words in *Street* from the passive conduct proscribed here.

> "While it may be that disrespect for the flag can constitute grounds for non-criminal sanctions, we think that promotion of loyalty and patriotism may not constitutionally furnish a justification for imposition of criminal penalties. If verbal abuse of the flag cannot be proscribed in an effort to encourage respect for our national symbol, then we fail to understand how physical abuse which is visually communicative, the archetype situation which the Massachusetts statute reaches, can similarly be forbidden on these nationalistic grounds." *Goguen* v. *Smith*, 471 F. 2d, at 101.

Assuming a legitimate state interest can be found in promoting patriotism, this statute is incapable of a constitutionally adequate narrowing construction. Indeed, rather than being unrelated to the suppression of free expression, this hypothetical governmental interest necessarily restricts it. This Court's analysis in *Schacht* v. *United States*, 398 U.S. 58 (1970), is particularly apposite here. Schacht was convicted of violating a federal statute allowing the wearing of an Army uniform off-duty only in theatrical productions which did not "tend to discredit" the Army. The government attempted to justify the proscription as reaching only non-expressional conduct allegedly unprotected by the First Amendment. The argument was disposed of by Mr. Justice Harlan when he stated that Schacht's conviction:

> "can be sustained only if he can be punished for speaking out against the role of the Army and our coun-

> try in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgement of freedom of speech. The final clause of [this statute] which leaves Americans free to praise the war in Vietnam but can send persons like [the defendant] to prison for opposing it, cannot survive in a country which has the First Amendment." *Schacht, supra,* at 63.

Like the statute in *Schacht,* this statute, ". . . to the extent that it evidenced a state interest in promoting nationalism, is directly related to the suppression of free expression" *Goguen* v. *Smith,* 471 F. 2d at 103. The restraint on free expression is not incidental to the furtherance of the governmental interest but instead is the very essence if it. The statute thus fails the third and fourth tests of *O'Brien.*

B. *The Statute is Unconstitutionally Overbroad as Applied to Appellee.*

1. Appellee's conduct was a form of expression entitled to First Amendment protection.

While perhaps having "nonspeech elements" (*O'Brien, supra,* at 376), appellee's activity is primarily a form of "silent, passive expression of opinion" (*Tinker, supra*) concerning the American flag and that which it represents. Viewed in this light, appellee's activity should be treated as "closely akin to 'pure speech' because of the 'political or controversial significance' of the symbol" involved. *Goguen* v. *Smith,* 471 F. 2d 88, 100, fn. 18; *Tinker, supra; Cohen* v. *California, supra.* See also *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969). What appellee did with respect to the flag is predominantly communicative and is indistinguishable from displaying the American flag below the flag of the United Nations (*Hodsdon* v. *Buckson,*

supra), displaying a red flag (*Stromberg* v. *California*, 283 U.S. 359 (1931), or wearing a shirt or vest made from an American flag (*Hoffman* v. *United States, supra; Cowgill* v. *California*, 396 U.S. 371 (1970)).[19]

Even if appellee's activity is not considered the equivalent of "pure speech," his particular use of the American flag was the communication of an attitude or idea through the use of a controversial symbol. Indeed, it was necessary for the jury to find that appellee conveyed a contemptuous attitude in order to convict him. He engaged then in symbolic expression, "the communicative content [of which] was beyond dispute." *Goguen* v. *Smith*, 471 F. 2d at 99. As previously discussed, the American flag has such powerful symbolic meaning, in and of itself, that "any individualized activity with regard to it . . . is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech.' " *Id.* The combination of the use of the flag, a "primary," "pure" symbol, and its display on the seat of his pants constitutes the mode of appellee's expression: the medium was the message.

The message is concededly imprecise.[20] However, precise expression is not a prerequisite of First Amendment expression. *Crosson* v. *Silver*. 319 F. Supp. 1084 (D. Arizona 1970); *Thoms* v. *Smith*, 334 F. Supp. 1203 (D. Conn. 1971); *Hodsdon, supra.* In the area of symbolic speech, precise

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[19] *Cowgill's* reference to a lack of communicative content is inapplicable here since the public display of a contemptuous attitude was not essential to Cowgill's conviction.

[20] The record is of some assistance. It reflects that persons nearby were laughing while appellee was being questioned about the flag by a policeman (App. 9). If the laughter was responsive, even in part, to the flag display (*i.e.*, not directed solely to the conversation), then it is evidence of an attitude toward the flag successfully conveyed to an apparently sympathetic audience. In any case, the laughter dispels any claim that an apparent or potential breach of the peace was imminent.

meaning is rarely discernible. Where a symbol is primary, like the American flag, it is hardly possible to postulate exact verbal meaning even where, as here, the conduct and the factual setting reflects an unambiguous intent to communicate. Compare *O'Brien, Hoffman* and *Joyce, supra.* In short, communicative value does not depend on whether the idea sought to be expressed can be verbalized. A flag on the seat of the pants is an idea *per se.*

> "Although the message may often seem somewhat 'inarticulate,' as it did to the Massachusetts Supreme Court and, we add, capable of various interpretations, ranging from misdirected humor to political criticism, revulsion at society's values, and rejection of any national fealty, we think it clear that communication is the process being engaged in . . . ." *Goguen* v. *Smith* 471 F. 2d, at 99-100.

2. No state interest in support of the statute justifies its application to appellee.

Only three possible legitimate state interests in support of the statute can be postulated: (1) protection against breaches of the peace, (2) protecting the physical integrity of the flag, and (3) preserving the flag as a symbol of unity on national ideals and purpose. None of these interests justifies penalizing appellee's expression under *O'Brien.*

There is no showing of any imminent or threatened breach of the peace, nor did appellee affect the physical integrity of the flag.

We concede that appellee's mode of expression may have contravened a hypothetical state interest in promoting patriotism, *vel non.* However, this Court has held that expressions of defiant or contemptuous attitudes toward the flag are protected by the First Amendment. *Street* v. *New York, supra.*

Conclusion.

For the foregoing reasons, the judgment below should be affirmed.

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